

Editor's note: Appealed -- dismissed, sub nom. Melcher v. Morton, Civ. No. 74-34-BLG (D.Mont. Sept. 4, 1974)

JOSEPH T. KURKOWSKI

IBLA 74-72

Decided February 28, 1974

Appeal from decision of Area Manager requiring stipulation of a stock passageway in favor of a third party as a condition precedent to issuance of a grazing lease.

Reversed and remanded.

Grazing Leases: Generally--Grazing Leases: Apportionment of Land

The granting of a grazing lease may be made subject to the condition that certain of the lands leased shall be available for use by an adjoining stockman as a passageway for his stock.

~~Officers: Members of Congress~~ Generally--Federal Employees and

18 U.S.C. § 431 (1970) provides that a Member of Congress may not be a party to any "contract or agreement" made or entered into in behalf of the United States or any agency thereof, by an officer or person authorized to make contracts on its behalf. The granting of a stock access on federal grazing land is a "contract or agreement" within the meaning of those terms as used in the statute.

~~Officers: Members of Congress~~ Generally--Federal Employees and

The provisions of 18 U.S.C. § 431 (1970) make the holding of a stock access on federal grazing land by a Member of Congress unlawful and void.

Federal Employees and Officers: Generally--Federal Employees and Officers: Authority to Bind Government

An agent of the Government has no authority to grant a right under public law contrary to a statute of the Congress.

APPEARANCES: Joseph T. Kurkowski, pro se.

OPINION BY MR. RITVO

Joseph T. Kurkowski has appealed from the decision of the Area Manager, Miles City District Office, Montana, Bureau of Land Management, issued July 17, 1973, requiring him to agree to the stipulation of a stock access in favor of John Melcher as a condition precedent to the issuance of a grazing lease applied for under section 15 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1275, as amended, 43 U.S.C. § 315m (1970).

Under normal circumstances, the granting of a grazing lease may be made subject to the condition that certain of the lands leased shall be available for use by an adjoining stockman as a passageway for his stock. Elmer R. Chandler, 59 I.D. 244, 247 (1946). However, in this instance, we are faced with an unusual circumstances. John Melcher, the party to benefit from the proposed stock access, is a Member of Congress.

A history of the incidents leading up to this present appeal may help clarify the situation. On May 14, 1955, John Melcher and Ruth Melcher filed a grazing lease application for sec. 24, SW 1/4 SE 1/4, T. 6 N., R. 40 E., P.M.M., Rosebud County, Montana. The Melchers were awarded a grazing lease for these 40 acres for a term beginning June 15, 1955, and expiring March 25, 1962. This lease was subsequently renewed in 1962 for a ten-year period with the new expiration date being March 24, 1972. By special election, June 24, 1969, John Melcher was elected to the 91st Congress to fill the vacancy caused by the resignation of James F. Battin. Congressman Melcher was re-elected to both the 92d and 93d Congresses. On February 19, 1972, the Melchers again submitted a renewal application for the subject land, and a lease was granted to John Melcher for the period of March 25, 1972, through February 28, 1981.

Both the 1962 and 1972 lease agreements signed by Mr. Melcher contained the following section:

[j] No Member of, or Delegate to, Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and no officer, agent, or employee of the Department of the Interior, other than members of the district advisory boards appointed in accordance with Section 18 of the Taylor Grazing Act (53 Stat. 1002; 43 U.S.C. 315c-1) shall be admitted to any share or part in this lease, or derive any benefit that may arise therefrom. See 41 U.S.C. 22; 18 U.S.C. 431-433, and 43 CFR 7. 1/

When it was realized that the lease had been improperly issued, it was canceled at Congressman Melcher's request.

Thereafter, on April 25, 1973, Vassau Flying X Ranch, Inc., filed an application for a grazing lease on the subject land. On April 30, 1973, appellant filed a conflicting application for the same 40 acres. On May 25, 1973, the District Office received a letter from Congressman Melcher's attorney requesting that a coulee along the southern edge of the tract be left unleased so that Mr. Melcher could have access from property he owns to the west of the 40 acres to water and corrals on other property he owns to the east.

In its decision of July 17, 1973, the District Office rejected the application of Vassau Flying X Ranch, Inc., and approved appellant's application subject to a livestock access in favor of Mr. Melcher. The request for the access to Mr. Melcher was to be granted subject to his fencing the north boundary of the stock pass. The stock pass was described as follows:

1/ 41 U.S.C. § 22 reads in pertinent part as follows:

In every contract or agreement to be made or entered into, or accepted by or on behalf of the United States, there shall be inserted an express condition that no Member of or Delegate to Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon.

18 U.S.C. §§ 431-433 will be discussed below.

Section (j) of the 1962 lease varied slightly from its 1972 counterpart. In 1962 there was no reference to 43 CFR 7, which prohibits employees of the Bureau of Land Management from directly or indirectly purchasing or becoming interested in the use of public land.

Starting at a point 430' north of the SW corner of the SW 1/4 SE 1/4 of Section 24, thence following the edge of the draw to its intersection with the east 40 line of the SW 1/4 SE 1/4, approximately 390' from the SE corner, containing approximately 12 acres.

On appeal, Mr. Kurkowski essentially argues that: (1) granting the stock access to Congressman Melcher would be in conflict with the laws of the United States; (2) Mr. Melcher has not demonstrated sufficient need for the stock access as he can drill a well on his own land to provide water for his cattle; and (3) assuming access through the leased lands is permissible, the stipulated stock pass is too large and would be used for grazing purposes and not solely as a passageway.

We need not deal with appellant's second and third points on appeal as the first issue raised is dispositive in this case. The provisions of 18 U.S.C. § 431 (1970) make the holding of a stock access on public land by a Member of Congress unlawful and void. The statute provides in pertinent part that:

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertakes, executes, holds, or enjoys, in whole or in part, any contract or agreement, made or entered into in behalf of the United States or any agency thereof, by any officer or person authorized to make contracts on its behalf, shall be fined not more than \$3,000. All contracts or agreements made in violation of this section shall be void * * *.

The Department has held that a Member of Congress will not be permitted to hold an oil and gas lease on public lands as such leases come within the meaning of the terms "contract or agreement" as used in the statute. John E. Miles, 62 I.D. 135, 139 (1955); John L. McMillan, 61 I.D. 16, 18 (1952). The proposed stipulation in this case would create a license in favor of Congressman Melcher to pass through leased, public grazing lands, subject to his agreeing to fence the northern boundary of the pass. This arrangement clearly establishes, by mutual assent of the parties, Congressman Melcher's rights and obligations with respect to the public land at issue. The Board is of the opinion that this

arrangement is clearly embraced within the broad meaning of the terms "contract or agreement" as used in 18 U.S.C. § 431 (1970).

In United States v. Dietrick, 126 F. 671 (C.C.D. Neb. 1904), the court dealt with a case involving the lease of land from a Member of Congress to the United States for the purpose of maintaining a post office facility. Circuit Judge (later Supreme Court Justice) Van Devanter described the comprehensive coverage of the proscriptive language used by Congress in section 3739 of the Revised Statutes, the provisions of which are now contained in 18 U.S.C. § 431 (with minor variations). Judge Van Devanter had the following to say with regard to the scope of that section:

We think it is entirely clear that the purpose and effect of this legislation is to absolutely inhibit all contractual relations with the United States upon the part of any member of or delegate to Congress through "any contract or agreement made or entered into in behalf of the United States, by any officer or person authorized to make contracts on behalf of the United States," save in the instances specifically exception * * *. 2/ The comprehensive character of the inhibition is more apparent when it is considered that it is not confined to contracts or agreements obtained or held through the exercise of the influence incident to membership of or delegateship to Congress, or to those which are not fair to the United States, or to those which give an undue advantage to a member of or delegate to Congress. It plainly includes "any contract or agreement," no matter how fairly obtained or held, how reasonable in its terms, or how advantageous to the United States. The inhibition is not alone against undertaking or executing--that is, making or entering into--such a contract or agreement, but also against holding or enjoying one--that is, having or retaining the title thereto or receiving the benefits thereof. Moreover, the language used shows great care in bringing equally within the condemnation and penalty of the statute any indirection employed for substantially accomplishing what is within the principal inhibition. A sufficient reason for such legislation is that it tends

2/ In 18 U.S.C. § 433 (1970), Congress granted certain specific exemptions from the prohibition contained in section 431. None of these exemptions are applicable in the present case. See John L. McMillan, supra at 18; 20 Comp. Gen. 46 (1940).

to preserve the independence of the legislative and executive branches of the Government, and to free each from that influence which might come to be exerted over it by the other if the officers of the executive branch, acting on behalf of the government, could freely contract with members of and delegates to Congress.

Id. at 673.

The broad coverage of 18 U.S.C. § 431 (1970) establishes that the granting of a stock access to Congressman Melcher would be illegal and void. An agent of the Government has no authority to grant a right under public law contrary to a statute of the Congress. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1916); Alaska District Council of the Assemblies of God, Inc., 8 IBLA 153, 155 (1972); Muriel E. Nunnelley, A-30074 (August 18, 1964); see also 43 CFR 1810.3(b). Accordingly, a stipulation requiring a stock access in favor of Congressman Melcher may not be required as a condition precedent to the issuance of appellant's grazing lease.

The scope of the relevant statutes is reflected in the lease form. Section (j) of the lease states that no Member of Congress may derive any benefits from the lease agreement, thus preventing the lease from being used as a vehicle to directly or indirectly benefit a Member of Congress. A stipulation within appellant's lease granting Congressman Melcher a stock pass would clearly be a breach of this express provision.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case is remanded to the Bureau of Land Management for action consistent with the views expressed herein.

Martin Ritvo, Member

We concur:

Douglas E. Henriques, Member

Frederick Fishman, Member

